Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

JAMES CURTIS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was deprived of any right to counsel at his state trial on a charge of armed robbery due to the absence of defense counsel at a lineup where no adversary judicial proceedings had been initiated aginst petitioner at the time he was placed in a lineup which would give rise to the Sixth Amendment right, where even if that right haa existed petitioner clearly waived it, where the trial court properly admitted pretrial and in-court identifications of petitoner where those identifications had sources independent of and untainted by the lineups, and where assuming arguendo that petitioner's Sixth Amendment rights had been violated, such

error was harmless beyond a reasonable doubt.

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JURISDICTION

Petitioner seeks to invoke the jurisdiction of the Court pursuant to 28 U.S.C. sec. 1257(3). However, as set forth below, petitioner has not presented adequate grounds to warrant a grant of certiorari.

IN THE

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OCTOBER TERM, 1986

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PEOPLE OF THE STATE OF ILLINOIS,

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RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Illinois, First District, affirming petitioner's conviction for armed robbery is reported as People v. Curtis and Ryder, 113 Ill.2d 136, 497 N.E.2d 1004 (1986).

STATEMENT OF THE CASE

Following a bench trial before the Honorable Richard J. Petrarca, petitioner and his co-defendant, Andrew Ryder, were found guilty of armed robbery and sentenced to 6 years each in the custody of the Illinois Department of Corrections. (R. 551, 577) The events which led to petitioner's conviction took place on July 18, 1979, at approximately 10:00 p.m., when petitioner and his co-defendant entered the Foremost Liquor store at 9361 S. Cottage Grove in Chicago, Illinois. (R. 272-73) Since the store was about to close, the only persons that were inside the store at this time were Thomas Buckle, the manager, Rosalind Harris, a cashier, Gregory Webb, a stock boy, and Fred Kennie, the security guard. (R. 272-73)

Shortly after entering the store, defendant Ryder pulled out a gun and held it to the back of the security guard, Kennie, as he removed the guard's gun from his holster, emptied the shells from it, and put the gun back into the guard's holster. (R. 277) At the same time, petitioner held a gun to Mr. Buckle and told him it was a hold up. (R. 276) Petitioner ordered Mr. Buckle and the other employees, Ms. Harris and Gregory Webb, the stock boy, to move to the back of the store and face the door with their hands up. (R. 277-78) Petitioner then took Mr. Buckle into the office and demanded that Mr. Buckle give him the money from within the office. (R. 278-79) Mr. Buckle opened the office desk drawers and petitioner took the checks and cash out of the drawers. (R. 280-81) Petitioner also removed the cash from both

cash registers at the front of the store and then forced Mr. Buckle to the rear of the store. (R. 283-84) Mr. Buckle, Ms. Harris, and Gregory Webb were then put into a storage room by petitioner. (R. 285) Defendant Ryder, who was with the security guard Kennie, then pushed Kennie into the room with the three other employees. (R. 285) They were told to stay in the storage room. (R. 286)

After a few minutes the employees came out of the storage room and found that petitioner and his co-defendant had left the store. (R. 286) The police were called, and after they arrived, the employees told them that one of the robbers was a white male, in his fifties, approximately 5 feet, 11 inches tall with gray hair, and that the other man was a black male, approximately 6 feet tall, 215 pounds

with reddish hair. (R. 286-287) Mr. Buckle stated that the lighting conditions in the liquor store at the time of the robbery were excellent. (R. 294-95)

In early February of 1981, Fred Kennie, the security guard who was present during the robbery of Foremost Liquors, informed the authorities that he was a participant in the armed robbery and that his accomplices were petitioner and defendant Ryder. (R. 505, 506, 510, 433-34)

On February 10, 1981, Mr. Buckle spoke with Detective Gorman of the Chicago Police Department and viewed some photographs. (R. 289) One array of five photographs included a photograph of D. Ryder, and another array of five photographs included a photograph of petitioner. (R. 25) Mr. Buckle identified a photograph of petitioner as resembling one of the offenders

in the robbery. (R. 292) Mr. Buckle also identified a photograph of defendant Ryder as resembling one of the offenders, but stated that he would also like to view the offender in person. (R. 131)

On February 11, 1981, Ms. Harris was shown the same sets of photographs. (R. 372) She also identified the photographs of petitioner and defendant Ryder as looking like the offenders. (R. 372-74)

On February 17, 1981, applications for the issuance of arrest warrants in the form of complaints for preliminary examination accusing petitioner and his co-defendant of armed robbery were sworn to and filed by Thomas Buckle, the manager of the Foremost Liquors store. (R. C588, Supp. R. 10) Chicago Police Detective Glynn obtained warrants for defendants' arrests from a judge of the Circuit Court of Cook County.

(R. 4-5) There is no evidence whatsoever in the record of any prosecutorial involvement in the procurement of those arrest warrants. (R. C589, Supp. R. 11, R. 4-5)

Detective Glynn arrested defendant Ryder pursuant to the warrant and transported him to the police station. (R. 4-5) Defendant Ryder was advised of his Miranda rights and was told that there was going to be a lineup held sometime that evening. (R. 26-27) Defendant Ryder was also told that he had a right to have an attorney present during the lineup. (R. 27) After requesting to speak with an attorney, Defendant Ryder attempted to contact attorney John Ambrose. (R. 5, 28) He spoke with Ambrose, and then Ambrose asked to speak with Chicago Police Detective Joe Gorman, who was also present at that time. (R. 5-6) Detective Gorman told Ambrose that

defendant Ryder had been arrested for armed robbery and that a lineup was to be held that evening. (R. 29-30) Detective Gorman testified that after this phone conversation, defendant Ryder refused to make any statement but did tell Detective Gorman that Ambrose would not be coming to the station. (R. 31, 126) Detective Gorman also testified that Ambrose himself told Detective Gorman that he was not coming to the police station because he "didn't feel he was needed as it was a warrant arrest, his client did not want to make a statement, and he was going out of town the next morning." (R. 31-32) John Ambrose testified, however, that he told Detective Gorman that he was in the process of finishing a brief and that it would be at least a couple of hours before he finished, but that he would come in to tne police station

after he finished the brief. (R. 49-50)

Defendant Ryder stood in two lineups that evening. (R. 8) The lineups were conducted by the police officers, although an assistant state's attorney observed the lineups. (R. 148-49, 190) Defendant Ryder's attorney was not present during either of the lineups. (R. 10)

Petitioner was also arrested on February 17, 1981, pursuant to a warrant. (R. 12) Petitioner was advised of his Miranda rights and told that there was going to be a lineup held that evening. (R. 16, 34) After being advised of his Miranda rights, petitioner declined to give a statement. (R. 35) He was told by the police that he had a right to have an attorney present during the lineup. (R. 16, 34) Petitioner replied that he had three attorneys and that he did not know

which one to call. (R. 34) Detective Glynn offered petitioner the telephone to call all three attorneys. (R. 34) Petitioner stated that he would rather wait and see what happened. (R. 35)

Petitioner did use the telephone to make some phone calls, after which Detective Gorman came in to speak to him. (R. 35, 128) Detective Gorman asked petitioner if he had been informed of his rights. (R. 129) Petitioner replied that he had been so informed. (R. 129) Detective Gorman also asked petitioner if he had an attorney. (R. 129-30) Petitioner replied that he had three attorneys, but that he did not want to talk to any of them because he was going to "play it by ear." (R. 130)

Petitioner stood in two lineups that evening. (R. 35, 45) Thomas Buckle viewed

one of the lineups that petitioner stood in and identified petitioner as one of the men in the robbery. (R. 293) This lineup was also conducted by the police, although an assistant state's attorney observed the lineup. (R. 148-49, 190)

On February 23, 1981, police officers visited Ms. Harris and showed her photographs of the lineups that had taken place on February 17, 1981. (R. 375-76) Ms. Harris identified petitioner and defendant Ryder as being the two men who robbed the liquor store. (R. 375-76)

The trial court concluded that the sixth amendment right to counsel had attached at the time petitioner and his co-defendant were placed in lineups. The trial court then held that defendant Ryder did not waive his right to have counsel present at the lineup and, therefore, his

motion to suppress that lineup identification was allowed. (R. 250) However, the court held that there was no suggestibility in the photographic identification of defendant Ryder used either before or after the lineup. (R. 250-51) Defendant Ryder's motion to suppress the photographic identification of him was consequently denied. (R. 251) Further, the trial court found that petitioner did waive his right to have counsel at the lineup and, accordingly, denied his motion to suppress the lineup identification. (R. 251) The court also held that there was no suggestibility in the photographic identification of petitioner used either before or after the lineup. (R. 251) Therefore, petitioner's motion to suppress the photographic identification was denied. (R. 251)

At petitioner and his co-defendant's

joint trial for armed robbery, both Mr. Buckle and Ms. Harris identified petitioner and defendant Ryder in court. (R. 274, 363-64) The trial court overruled defense objections that Ms. Harris' in-court identifications were the result of the unconstitutionally obtained lineup identifications and that they should have been suppressed. (R. 364) Ms. Harris also testified at trial that she had seen the lineup photograhs on February 23, 1981, and that she had identified petitioner and his co-defendant at that time. (R. 375-76) Defense objections to this testimony were also denied by the trial judge. (R. 360) The lineup photographs were later admitted into evidence. (R. 492)

Fred Kennie testified against petitioner and defendant Ryder at trial pursuant to an agreement with the People of

the State of Illinois. (R. 435) The agreement was that Kennie would plead guilty to armed robbery and the State would recommend that Kennie receive a 6 year term in the custody of the Illinois Department of Corrections. (R. 436) In addition, Kennie was to plead guilty to a pending forgery charge and would receive a concurrent minimum sentence for that charge. (R. 436) Kennie also had a possession of controlled substance charge pending whch the State had agreed to dismiss or nolle prosse. (R. 437) Two misdemeanor counts of deceptive practices were further included in the agreement. (R. 437)

The Illinois Appellate Court, First District, Third Division, reversed petitioner's and his co-defendant's convictions and remanded the cause for a new trial by concluding that petitoner's and his co-defen-

dant's sixth amendment right to counsel had been violated. The Appellate Court determined that the filing of the felony complaint in the circuit court in order to obtain arrest warrants initiated adversarial judicial proceedings against petitioner and his co-defendant, and that consequently the sixth amendment right to counsel had already attached at the time of the lineups. The Appellate Court found that the trial court properly suppressed the pretrial lineup identification of defendant Ryder since defendant Ryder did not have counsel at the lineup. However, the Appellate Court reversed the trial court's ruling that petitioner knowingly waived his sixth amendment right to counsel at the lineup given the manifest weight of the evidence surrounding petitioner's answers to the police prior to the lineup.

Moreover, in concluding that petitioner did not waive his sixth amendment right to counsel, the Appellate Court applied principles applicable to the fifth amendment right to counsel to the sixth amendment right to counsel through the holdings in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880 (1981), and Smith v. Illinois, ___ U.S.___, 105 S.Ct. 490, 83 L.Ed. 2d 488 (1984). These cases hold that once a suspect in custody asserts his right to counsel, he is not subject to further interrogation by authorities until counsel has been made available to him, unless the accused himself initiates further conversations with the police. The Appellate Court held here that once petitioner stated that he did want to make any statements until he saw his attorney, the police should not have initiated any con-

versations prior to the lineup; consequently, the Appellate Court concluded that any responses which petitioner made thereafter which were construed as a waiver of assistance of counsel were unconstitutionally obtained.

Further, the Appellate Court concluded that the assistant state's attorney at trial improperly elicited testimony from Mr. Buckle that he identified petitioner and his co-defendant at the lineups which the Appellate Court decided had violated petitioner's and defendant Ryder's constitutional rights. The Appellate Court also decided that Ms. Harris improperly testified that she had identified petitioner and defendant Ryder from the lineup photographs and that these same photographs were admitted into evidence. Since the Appellate Court determined that this testimony and

evidence were the results of the unconstitutional lineups, the Court ruled that they should have been prohibited without regard to whether the People could prove that the pretrial and in-court indentifications had an independent source.

Finally, the Appellate Court held that the violations of petitioner's and defendant Ryder's sixth amendment rights were not harmless beyond a reasonable doubt.

The Illinois Supreme Court reversed the Appellate Court on June 20, 1986. The Court held that it was not necessary to pass upon the propriety of the Appellate Court's views as to the necessity of counsel at the lineups or petitioner's alleged waiver of the right. The Court stated that even assuming that the appellate court's resolution of these questions was correct, its application of the Wade-Gilbert

exclusionary rule was erroneous. The Illinois Supreme Court held that under a correct application of the principles articulated in those cases, any error resulting from the uncounseled lineups was harmless beyond a reasonable doubt.

REASON FOR DENYING THE WRIT

PETITONER WAS NOT DEPRIVED OF HIS RIGHT TO COUNSEL AT HIS STATE TRIAL ON A CHARGE OF ARMED ROBBERY DUE TO THE ABSENCE OF DEFENSE COUNSEL AT A LINEUP WHERE NO ADVERSARY JUDICIAL PROCEEDINGS HAD BEEN INITIATED AGAINST PETITIONER AT THE TIME HE WAS PLACED IN A LINEUP WHICH WOULD GIVE RISE TO THE SIXTH AMENDMENT RIGHT, WHERE EVEN IF THAT RIGHT HAD EXISTED PETITIONER CLEARLY WAIVED IT, WHERE THE TRIAL COURT PROPERLY ADMITTED PRE-TRIAL AND IN-COURT IDENTIFICATIONS OF PETITIONER WHERE THOSE IDENTIFICATIONS HAD SOURCES INDEPENDENT OF AND UNTAINTED BY THE LINEUPS, AND WHERE ASSUMING ARGUENDO THAT PETITIONER'S SIXTH AMENDMENT

RIGHTS HAD BEEN VIOLATED, SUCH ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

The trial court here properly admitted into evidence the pretrial and in-court identifications of petitioner by witnesses to the armed robbery where no right to counsel had attached at the time of the lineups since no adversary judicial proceedings had been initiated against petitioner. Furthermore, assuming that the right to counsel had attached, the trial court properly held that petitioner waived that right, and in any event, there existed independent bases for the identifications.

It is well-established that an individual's sixth amendment right to counsel attaches at or after the initiation of adversary judicial criminal proceedings

whether by way of formal charge, preliminary hearing, indictment, information or arraignment. Kirby v. Illinois, 406 U.S. 682, 689, 32 L.Ed. 2d 411, 92 S.Ct. 1877 (1972). The initiation of adversary proceedings is determined by looking to the point at which the government has committed itself to prosecute and the adverse positions of the parties have solidified. Kirby, supra, 406 U.S. at 689.

Illinois law provides that felony prosecutions must be commenced by indictment or information and not by complaint. Ill. Rev. Stat. 1987, ch. 38, secs. 111-1 and 111-2. The Illinois Supreme Court has stated that there is respectable authority that whether adversarial proceedings commence with the filing of a complaint depends upon the degree of prosecutorial involvement.

People v. Owens, 102 Ill.2d 88, 101, 464 N.E.2d 261 (1984). The court in Owens noted that while the filing of a simple complaint by or at the direction of the prosecutor may constitute the commencement of adversary judicial proceedings, the filing of such a complaint by a police officer in order to secure an arrest warrant, with no indication of prosecutorial involvement, does not necessarily have a similar effect. Id.

Several Illinois Appellate Court decisions have held that where the extent of the prosecutor's involvement in the procurement of the warrant is no more than in the assistance and preparation of the complaint the arrest must be characterized as purely investigatory without any committment by the State at this point to pursue prosecution. People v. Boswell, 132

Ill.App.3d 52, N.E.2d 476 (1st Dist., 4th Div. 1985) People v. Racanelli and Watters, 132 Ill.App.3d 124, 476 N.E.2d 1179 (1st Dist., 5th Div. 1985).

In the present case, no adversary judicial proceedings had been commenced against petitioner. He had merely been arrested pursuant to warrants obtained by Detective Glynn. (R. 4, 12) There is no evidence in the record of any prosecutorial involvement whatsoever prior to the issuance of the arrest warrants and the placement of petitioner in the lineups. (R. 4-5) When the lineups were conducted, an assistant state's attorney merely observed those lineups. (R. 148-149, 190) The record further shows that prosecutorial involvement in this matter did not begin until after these lineups were conducted, when Assistant State's Attorney Farrell

approved charges against petitioner the day after the lineups were held. (R. C589, Supp. R. 11) Clearly, in the instant case, where no information or indictment had been filed against petitioner, and where no evidence existed of any prosecutorial involvement in obtaining the arrest warrants, the arrest must be characterized as purely investigatory, without any commitment by the State at that point to pursue prosecution. Furthermore, assuming arguendo that petitioner's sixth amendment rights had been violated the trial court properly concluded that the manifest weight of the evidence established that petitioner waived that right.

A waiver of counsel must be voluntary and must constitute a knowing and intelligent relinquishment of a known right. Edwards v. Arizona, 451 U.S. 477, 68 L.Ed.

2d 378, 101 S.Ct. 1880 (1981). In determining whether a defendant has waived counsel, courts must look to the particular circumstances surrounding the case, including the background, experience, and conduct of the accused. Johnson v. Zerbst, 304 U.S. 458, 464, 82 L.Ed. 1461, 58 S.Ct. 1019 (1938). The preliminary inquiry as to whether there has been a waiver of the right to counsel is for the trial court. People v. Dailey, 51 Ill.2d 239, 242, 282 N.E.2d 129 (1972). In making its determination of whether the right to counsel has been waived, the trial court need not be convinced beyond a reasonable doubt, and the finding of the trial court on this issue will not be disturbed unless it is against the manifest weight of the evidence. Id. The record in the instant case shows that even if petitioner had a right

to the assistance of counsel at the lineups, which he did not, the facts and circumstances surrounding the lineup indicate that petitioner waived his right to have counsel present at the lineup and, therefore, the trial court's finding that petitioner voluntarily waived his right to counsel is not aginst the manifest weight of the evidence.

Petitioner was advised of his Miranda rights upon arrival at the police station. (R. 16) He was also advised that he had the right to have an attorney present at the lineup which was to be held that evening. (R. 16) Petitioner stated that he had three attorneys whom he could call, and he was then offered the telephone to call an attorney. (R. 34) After being informed of his opportunity to contact an attorney, petitioner told Detective Glynn

that he wanted to "wait and see what happened." (R. 35) Detective Gorman also asked petitioner if he wished to make a phone call, to which petitioner replied that he did not wish to call an attorney because he was going to "play it by ear." (R. 130)

These statements, combined with the fact that the lineup was not conducted until one and a half hours after petitioner's arrest and the fact that he had been told by the police throughout that period of time that he could have counsel present during the lineup, support the trial court's conclusion that he waived any possible right to have counsel present. (R. 251) Petitioner had ample time and opportunity to contact an attorney and have one present, yet he failed to do so. Petitioner had contact with attorneys in

the past, but on this occasion chose to "play it by ear" and "see what happened." (R. 35, 130) Petitioner's background and experience demonstrate that he knew he had the right to an attorney, and his language and conduct prior to the lineup show that he knowingly, intelligently and voluntarily waived that right. Therefore, the trial court correctly ruled that petitioner waived his constitutional right to counsel at the lineup.

The Illinois Supreme Court further correctly held that any police-initiated conversation with petitioner as to whether he wished to have an attorney present at the lineup, after he had refused to give a statement without an attorney present, was proper and, therefore, any waiver of the right to counsel was constitutionally obtained. Petitioner mistakenly compares

the situation in the instant case to that in Edwards v. Arizona, 451 U.S. 477, 68 L.Ed. 2d 378, 101 S.Ct. 1880 (1981), and Smith v. Illinois, ___ U.S. ___, 83 L.Ed. 2d 488, 105 S.Ct. 490 (1984). Based on Edwards, petitioner argues that once a suspect in custody asserts his right to counsel, he "is not subject to further interrogation by the authorities until counsel has been made available to him unless the accused himself initiates further communication, exchanges, or conversations with the police."

The instant case is both factually and legally distinguishable from Edwards and Smith. Edwards and Smith hold that once a suspect asserts his right to counsel, he is not subject to further interrogation by the authorities until counsel has been made available to him,

unless he validly waives his earlier request for assistance of counsel. Edwards v. Arizona, supra, 451 U.S. at 484-85; Smith v. Illinois, supra, 105 S.Ct. at 492. This rule was enacted to protect an accused's fifth amendment right to counsel in order to be free from self-incrimination. Edwards, supra, 451 U.S. at 485; Smith, supra, 105 S.Ct. at 494-495.

Assuming arguendo that adversary judicial proceedings had begun, the instant case, unlike Smith and Edwards, involves a different constitutional right, namely, an accused's sixth amendment right to counsel to assist the accused and to insure fairness at the beginning of adversary judicial proceedings. See Kirby v. Illinois, 406 U.S. 682, 32 L.Ed. 2d 411, 92 S.Ct. 1877 (1972). The fifth amendment Edwards-Smith analysis must not be applied in a sixth

amendment setting since the right to counsel in each instance exists to protect different constitutional rights. Police officers cannot be prohibited from making further inquiries of an accused as to whether he wishes to call an attorney, or whether he has contacted an attorney who will be coming to the lineup, merely because the accused has stated that he does not wish to give a statement without his attorney present. The State should not have to wait until the accused initiates further conversation to determine if or when an attorney is coming. Petitioner's reliance on Edwards and Smith, therefore, is misplaced.

Petitioner also argues that the pretrial and in-court identifications of petitioner by witnesses to the armed robbery should have been excluded without

regard to whether the pretrial or the in-court identifications had an independent source. It is well-established, however, that even if a lineup identification violates an accused's sixth amendment right, subsequent in-court identifications are still admissible if based on a source independent of and untainted by the lineup identifications. United States v. Wade, 388 U.S. 218, 18 L.Ed. 2d 1149, 87 S.Ct. 1926 (1967); People v. McDonald, 62 Ill.2d 448, 343 N.E.2d 489 (1975). Several factors must be considered in ascertaining whether there is an independent origin for an identification including: 1) the opportunity of the witness to view the offender at the time of the crime; 2) the witness' degree of attention at that time; 3) the existence of any discrepancy between any pretrial description and defendant's actual

appearance; 4) the lapse of time between the crime and the confrontations; 5) any identification of another person prior to the lineup; and 6) the failure to identify the defendant on a prior occasion. People v. Payne, 102 Ill.App.3d 950, 959, 429 N.E.2d 1344 (1st Dist., 2nd Div. 1981).

Under the law set forth in the above cited cases, the in-court identifications of petitioner were properly admitted. Both Mr. Buckle and Ms. Harris had independent bases for their in-court identification of petitioner as one of the robbers. Mr. Buckle testified that he saw petitioner enter the store on the night of the incident. (R. 273, 274) Petitioner was the man who put a gun in Mr. Buckle's back and told him it was a hold up. (R. 276, 277) Mr. Buckle had an excellent opportunity to observe petitioner as the light-

ing in the store that night was excellent. (R. 295) When petitioner ordered the other employees to the back of the store, Mr. Buckle was facing petitioner. (R. 319) The description Mr. Buckle gave police was for a black man, approximately 6 feet tall, 215 pounds, with reddish hair. (R. 287) This description matched petitioner. (Supp. R. 11) On February 10, 1981, prior to any lineup, Mr. Buckle was shown a photographic spread by police. (R. 289) From this array of photographs, he identified petitioner as one of the robbers. (R. 292)

Ms. Harris' in-court identification of petitioner had an independent basis as well. She testified that she observed petitioner enter the store on the night of the incident. (R. 363) She further observed petitioner when he forced her and the other employees to the back of the

store and against the wall. (R. 368) On February 11, 1981, she was shown a photographic spread by police. (R. 372) From this array of photographs she selected a picture of petitioner and positively identified him as one of the robbers. (R. 373, 374, 414) Both Ms. Harris and Mr. Buckle had independent recollections of petitioner prior to the allegedly improper lineup. Assuming arguendo that the absence of defense counsel at the lineups was error, since the trial court had ample evidence that the in-court identifications of petitioner were based upon origins independent of the lineups, the absence of defense counsel at the lineups does not require reversal on appeal. People v. McDonald, supra.

Petitioner further argues, that the testimony concerning Ms. Harris' pretrial

identification of petitioner from photographs of the lineups and the introduction of those photographs into evidence was improper because this testimony and evidence were the direct result of the violation of petitioner's right to counsel. As stated above petitioner waived his right to have an attorney present at the lineup. Therefore, there was no primary illegality as to his lineup and the testimony and evidence of Ms. Harris' identification of petitioner from the lineup photograph was not tainted. The sixth amendment does not require that defense counsel be present when a witness views photographic arrays. United States v. Ash, 413 U.S. 300, 37 L.Ed. 2d 619, 93 S.Ct. 2568 (1973). Moreover, assuming arguendo that Ms. Harris' identification of petitioner from the lineup photographs was error, this error

must be deemed harmless since Ms. Harris had a clear and independent opportunity to view petitioner during the robbery and subsequently made a positive in-court identification of petitioner.

Assuming arguendo that petitioner's sixth amendment right to assistance of counsel at the lineups was violated, this error must be deemed harmless. Fred Kennie testified at trial that petitioner and defendant Ryder robbed the liquor store on the night in question. (R. 430-33) His description of the events that took place inside the liquor store matched the description given by the other eyewitnesses in every detail, indicating that it is highly unlikely that Kennie's description of the events was fabricated. (R. 429-433, 363-71, 272-87) Furthermore, Kennie's agreement with the State con-

cerning his decision to testify against petitioner did not include any dismissal of the armed robbery charges pending against him. Kennie was to receive the minimum sentence in exchange for his guilty plea to the armed robbery charge, which, under Ill. Rev. Stat. 1981, ch. 38, sec. 18-2(b) and 1005-8-1(3), amounted to a 6 year prison term in the Illinois Department of Corrections-the same sentence that was received by petitioner and defendant Ryder. (R. 436, 551-77) In light of the substantial evidence of petitioner's guilt, any error in the admission of the pretrial or in-court identifications into evidence at trial must be deemed harmless, and is not a ground for reversal on appeal. Chapman v. California, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967).

CONCLUSION

Respondent, the People of the State of Illinois respectfully request that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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